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No. 414

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Supreme Court of the United States

OCTOBER TERM—1965

In the Matter

of

IRA HAUPT & CO.,
a Limited Partnership,

Bankrupt,

BERNARD KLEBANOW, GEORGE LEWIS, MICHAEL SLOAN and HAROLD L. MARANTZ, KENNETH ALAN MARANTZ and EDITH LEE MARANTZ, as Executors of the Estate of Charles Marantz,

Petitioners,

LAZARUS S. HEYMAN,

Petitioner,

THE CHASE MANHATTAN BANK and MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF

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5 Moore, Federal Practice ¶46.06, pp. 1902-1905 (2d ed. 1964) 7

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PETITIONERS' REPLY BRIEF

Respondents do not address themselves to the issues raised by the decision below and by the Petition herein, which are whether the right to vote in bankruptcy proceedings involving limited partnerships is governed by Section 5c of the Bankruptcy Act which contains no disenfranchising provisions or by Section 44a thereof and whether limited partners fall within the disenfranchised category set forth in Section 44a even though they are not specifically enumerated. Respondents urge instead, that the question

presented by the Petition is moot and that, in any event, the decision below is correct because the limited partners are not creditors.

The Court below did not, of course, hold that the question was moot even though the facts as they then existed relative to mootness are no different than they are today. So also, respondents argued to the Court of Appeals that petitioners are not creditors, yet that Court treated petitioners as creditors but ruled that even so they were disenfranchised by Section 44a just as stockholders are thereby disenfranchised even though they are also creditors of a bankrupt. Indeed, Section 44a is applicable only to persons who are creditors. It bars creditors from voting if they have some sort of disqualification. The ruling below thus was that the petitioners were creditors but were debarred from voting because of their status as limited partners.

Respondents thus urge reasons for the denial of the Petition here on grounds which were not accepted by the Court below itself as the basis for its decision.

In any event, respondents are in error in both of their contentions.

I

The Question Presented By The Petition Is Not Moot

In support of their contention, respondents refer to alleged facts in connection with the subsequent election of Charles Seligson as trustee in bankruptcy of Ira Haupt & Co. (hereinafter "Haupt") which are not in the record now before this Court. Respondents rely in this connection upon statements in another District Court decision (240 F. Supp. 10), the order with respect to which is itself presently on appeal to the Court of Appeals for the Second Circuit (a fact which is not adverted to by respondents).

The election in which petitioners here were disqualified from voting their claims as creditors was held during the

pendency of the Chapter XI proceedings of Haupt pursuant to Section 338 of the Bankruptcy Act. In that election the candidates were Glickman and Feldman. Glickman received the five subsequently disqualified votes (involving claims of $1,795,861.15) of petitioners, as opposed to the single vote (involving a $19,000 claim) which the Referee treated as sufficient for the nomination of Feldman (30b-34b). Thus, if petitioners were improperly disenfranchised, Glickman would have had a majority in number and amount of claims and was the properly nominated trustee. Bankruptcy Act, § 56a..

The Referee, having disenfranchised petitioners, felt it unnecessary to pass upon certain claims (primarily those of various banks) voted for Feldman, to which claims petitioners had formally raised various objections. For example, it was contended that the banks had received preferences and therefore could not vote (A38, A43-A44). If those objections are upheld by the Referee, and it must be assumed that they will be for purposes of respondents' mootness argument, petitioners' votes must be regarded as having nominated Glickman as trustee in the Chapter XI proceeding.

If petitioners were not disqualified and if Glickman was nominated, Section 338 of the Bankruptcy Act requires that he be appointed trustee in bankruptcy in the Haupt bankruptcy proceedings. For Section 338 provides that

> "the creditors . . . *may* nominate a trustee who *shall* thereafter be appointed by the court in case it shall become necessary to administer the estate in bankruptcy . . ." [emphasis added].

This Court has noted the mandatory requirement of such a use of the word "shall", stating that

> ". . . The word 'shall' is 'ordinarily the language of command.' . . . And when the same Rule uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory. . . ." *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947).

Respondents' purported authorities (Opp. Br. 5) do not contradict the foregoing principles. Indeed, respondents miscite Collier, which states without equivocation that where, as here (A29, A33),

> "the debtor was adjudged a bankrupt at the time of the order directing bankruptcy, . . . the trustee nominated under § 338 *must be* appointed trustee. . . ." [Emphasis added] 8 COLLIER, BANKRUPTCY ¶5.49[12.2], pp. 781-782 (14th ed. 1964).

Moreover, respondents' citation of *In re Dejay Stores, Inc.* is not in point. There, neither candidate for nomination as trustee in the Section 338 election had "obtained the requisite majority in both number and amount of those creditors present and voting", 220 F. Supp. at 498, and it was thus held that the creditors were entitled to elect, rather than have the Referee in the first instance appoint, a trustee after it was directed that the bankruptcy proceed. The instant case is distinguishable in that if petitioners' votes had been properly counted, a trustee (*viz.*, Glickman) was actually nominated in the Section 338 election.

Since Section 338 requires appointment of the trustee nominated thereunder, there can be no doubt that, if Glickman were nominated at the election held thereunder, Seligson's subsequent purported election is void. Moreover, respondents' reference to Seligson's ability and petitioners' alleged recognition thereof—a recognition which does not in fact exist, since petitioners subsequently challenged the adequacy of Seligson's administration before the Referee—is irrelevant. If Glickman was nominated in the Section 338 election, the best qualifications on the part of Seligson would not allow him to usurp Glickman's office as trustee contrary to Section 338. Noteworthy in this connection is the fact that the record discloses no defect whatsoever in Glickman's own qualifications as trustee.

Finally, it should be noted that Seligson was elected trustee in bankruptcy in the subsequent bankruptcy proceedings on the basis of the votes of 9 former employees of

Haupt whose claims totalled $153,944.25. The limited partners were there held to be disenfranchised on the basis of the decision in this case. Respondents do not advert to the fact that an appeal is pending as to the right of the 9 former employees to vote on the ground that they were not creditors. So also, respondents do not disclose that the claims of the banks and of the Exchange which were voted for Seligson were objected to on numerous grounds which were not tried because the Referee deemed it unnecessary so to do since he had disqualified the limited partners on the basis of the decision herein and therefore had ruled Seligson elected by the votes of the 9 former employees.

II

Petitioners Are Creditors Of The Bankrupt

All the decisions below treated petitioners as creditors of Haupt, but justified—erroneously, as the Petition shows—their disenfranchisement on the ground that they fall within a class of creditors who are barred from voting for a trustee in bankruptcy by Section 44a of the Bankruptcy Act (8b-12b, 20b-21b, 32b). Respondents here go further, arguing that petitioners were not even creditors. That argument is in error for several reasons.

1. Three of petitioners—Klebanow, Lewis and Sloan—were the original petitioning creditors who had Haupt adjudicated a bankrupt, pursuant to Section 59b of the Bankruptcy Act (23b). Their right to petition, as creditors, for a bankruptcy adjudication was necessarily upheld by the affirmance by the Court of Appeals of the District Court's denial (A33) of a motion by Haupt to stay the adjudication of bankruptcy. *Ira Haupt & Co.* v. *Klebanow*, 348 F. 2d 907 (2d Cir. 1965).

The term "creditors" as used in Section 59b is the same as that used in Sections 5c and 44a, and includes anyone who "owns a debt, demand or claim provable in bank-

ruptcy", Bankruptcy Act, § 1(11). Since the Court of Appeals has held it appropriate to proceed with the adjudication where three of petitioners were the petitioning "creditors", it necessarily follows that they, and the other petitioners here (having similar claims), must be regarded as "creditors" for other purposes of the Bankruptcy Act, including Sections 5c and 44a.

2. The major thrust of respondents' argument is that petitioners' claims are for their capital investments as limited partners in Haupt and that such claims are subordinate to other creditors' claims. Even if such a sweeping characterization were treated as accurate, petitioners are still creditors of Haupt, for the fact that a claim is subordinated does not mean that its owner ceases to be a creditor under the Bankruptcy Act. *Goldstein* v. *Wolfson*, 132 F. 2d 624, 626 (2d Cir. 1943). The *Goldstein* case is consistent with the holding that a limited partner has "a debt claim" against the assets of the limited partnership for his contribution and profit share "subject to the claims of general creditors who are not limited partners," *Alley* v. *Clark*, 71 F. Supp. 521, 525, 528 (E. D. N. Y. 1947).

Moreover, respondents missate when they claim that "petitioners seek only a return of their capital investment in Haupt" (Opp. Br. 8). As already noted in the Petition (8-9), each petitioner has not only a claim for his contract capital (*i.e.*, his capital investment in Haupt), which was at the risk of the business, but also as a customer creditor for securities, over and above his contract capital, which were on deposit with Haupt and which were not at the risk of the business.* Petitioners' claims as customer

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* Respondents attempt to dispose of petitioners' claims as customer creditors by urging that such claims "are based solely on their capital investments allegedly in excess of the requirements of the Haupt partnership agreement" (Opp. Br. 6). There is no support in the record for such assertion and it is not correct. In any event, their argument misses the point that, to the extent that the market value of a limited partner's securities plus his cash contribution exceeded his contract capital, he was free to withdraw that excess value at any time (see Art. 33(3) at A 47).

creditors amount to $223,679.97 (See A 48, which is typical of the proof of claim filed by each petitioner, and 31b), an amount in itself sufficient to nominate Glickman as against the $19,000 claim allowed by the Referee on behalf of Feldman. With respect to such claims, it has been noted that

> "a creditor of a firm who is also one of its partners, should not for that reason be deprived of the right to vote for trustee in the firm's bankruptcy." 3 COLLIER, BANKRUPTCY ¶56.03, pp. 50-51 (14th ed. 1964).

3. Respondents did not raise any objection to petitioners' claims in the Section 338 election here under review on the ground that petitioners are not creditors of Haupt. Respondents objected to the voting of claims by the limited partners only on the basis of the disenfranchisement language of Section 44a and, indeed, recognized that petitioners were creditors at least with respect to claims as customer creditors (A 41-A 43). It is now too late for assertion of the additional objection, because had it been timely raised petitioners would have been entitled to introduce proof of their status as creditors. 3 COLLIER, BANKRUPTCY ¶57.18[5], pp. 269-270 (14th ed. 1964); *cf.* Rule 46, F. R. Civ. P.; 5 MOORE, FEDERAL PRACTICE ¶46.06, pp. 1902-1905 (2d ed. 1964). For example, with respect to petitioners' claims as customer creditors, they could have proved that they actually had, during the term of the Haupt partnership and prior to November 1963, extensively traded in the securities involved.

4. Respondents have been led into error by their refusal to appreciate the dual nature of limited partners such as petitioners. Thus, such partners are both investors and creditors. See *Matter of Price, McCormick & Co.*, 171 N. Y. 15 (1902). With respect to their capital contributions, they are both investors and creditors, albeit as such creditors subordinated by the partnership agreement and such statutory provisions as Sections 105 and 112 of the New York Partnership Law, to claims of other, non-partner, creditors. With respect to other claims, such as those relative to their

securities as customers, limited partners can be and are creditors and permitted, as noted in the Petition (9), by such statutory provisions as Section 5g of the Bankruptcy Act and Section 102 of the New York Partnership Law to be treated *pro rata* with other like creditors with respect to such claims. The language of Section 102(1)(b), cited by respondents (Opp. Br. 6), does not change that result, for it is designed to do no more than prohibit limited partners from receiving payment *in preference* to other creditors.

Respondents' authorities are inapposite. For example, *Klebanow* v. *New York Produce Exchange,* 344 F. 2d 294 (2d Cir. 1965), cited by respondents (Opp. Br. 7), held on a motion to dismiss the complaint only that Haupt limited partners had standing to sue derivatively for an antitrust violation damaging Haupt. The motion did not involve the claims of such partners as *creditors* (which claims were involved and sustained in *Ira Haupt & Co.* v. *Klebanow, supra*), and the decision can not be read as affecting such claims.

Conclusion

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Bankruptcy Act, Section 338

At such meeting the creditors may appoint a committee, if none has previously been designated or appointed under this Act, and, if a trustee has not previously been appointed, may nominate a trustee who shall thereafter be appointed by the court in case it shall become necessary to administer the estate in bankruptcy as provided under this chapter.